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### Turning Wisconn Valley into the Next Silicon Valley: Reforming Wisconsin Non-Compete Law to Attract High-Tech Employers

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# TURNING WISCONN VALLEY INTO THE NEXT SILICON VALLEY: REFORMING WISCONSIN NON-COMPETE LAW TO ATTRACT HIGH-TECH EMPLOYERS

*The July 2017 arrival of Taiwanese tech-giant Foxconn and the establishment of the Wisconn Valley Science and Technology Park in Wisconsin reflects a larger trend in the United States to reinvent the nation's manufacturing economy with high-tech production. High-tech employers have substantial interests in retaining employees in order to protect their valuable proprietary information and market share. Non-compete agreements, also known as restrictive covenants or covenants not to compete, are often the legal device used to secure these interests. This Comment argues that to attract and retain employers in the tech industry, Wisconsin should reform its non-compete law by adopting new statutory language and exercising judicial restraint that reconciles conflicts of interest between employers, employees, and the public.*

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## I. INTRODUCTION

“[T]he single largest economic development project in the history of Wisconsin.”<sup>1</sup> A “game changer.”<sup>2</sup> “[A] home run for Wisconsin.”<sup>3</sup> “[S]omething so special.”<sup>4</sup> These are a small sampling of the reactions to Taiwan-based Foxconn’s July 2017 announcement that the tech-giant would invest ten billion dollars in Wisconsin by constructing an ultramodern LCD manufacturing plant and establishing its North American headquarters in the state.<sup>5</sup> The move also inspired the creation of the Wisconn Valley Science and Technology Park.<sup>6</sup>

The plan, and its reception, reflects a larger trend in the United States to reinvent the nation’s manufacturing economy with high-tech production. While the U.S. maintains the world’s strongest research and development culture, it has failed to focus on the production of the high-value technologies it creates.<sup>7</sup> This “innovate here, produce there”<sup>8</sup> model has resulted in serious

1. Patrick Marley & Jason Stein, *Foxconn Announces \$10 Billion Investment in Wisconsin and up to 13,000 Jobs*, MILWAUKEE J. SENTINEL (July 26, 2017), <https://www.jsonline.com/story/news/2017/07/26/scott-walker-heads-d-c-trump-prepares-wisconsin-foxconn-announcement/512077001/> [https://perma.cc/SZ3S-G4HB]. This quote was given by Wisconsin Governor Scott Walker on July 26, 2017. *Id.*

2. *Id.* This quote was given by Speaker of the House Paul Ryan on July 26, 2017. *Id.*

3. *Id.* This quote was given by White House Chief of Staff Reince Priebus on July 26, 2017. *Id.*

4. Donald Trump, President, U.S., Remarks at Foxconn Facility (June 28, 2018). This quote was given by President of the United States Donald Trump on June 28, 2018. *Id.*

5. Lulu Chang, *Foxconn is Coming to America — More Specifically, to its New Milwaukee HQ*, DIG. TRENDS (June 17, 2018), <https://www.digitaltrends.com/mobile/foxconn-milwaukee/> [https://perma.cc/P3DM-YZT4].

6. See Michael Burke, *Wisconn Valley, Early Stages, Taking Shape*, J. TIMES (Oct. 4, 2018), [https://journaltimes.com/business/local/wisconn-valley-early-stages-taking-shape/article\\_e1484360-2af6-5cdf-94b2-93b6f138b222.html](https://journaltimes.com/business/local/wisconn-valley-early-stages-taking-shape/article_e1484360-2af6-5cdf-94b2-93b6f138b222.html) [https://perma.cc/2LYF-DJTC]. “The Wisconn Valley Science and Technology Park will . . . serve as a science and technology park to promote research and development in advanced technologies in areas such as cloud computing, mobile devices, Internet of Things, Big Data, artificial intelligence (AI), networks, and robotics and automation . . . . In addition, it will serve as an industry internet platform to enable hundreds of thousands of small and medium size manufacturers to be part of the advanced manufacturing in the Midwest and in America.” Press Release, Foxconn, Foxconn and U.S. Leaders Celebrate Groundbreaking of Wisconn Valley Science and Technology Park (June 28, 2018) (on file with Urban Milwaukee). The hub has also inspired the Wisconn Valley Venture Fund, which will invest in high-tech startups and manufacturing. Rick Romell & Sarah Hauer, *Foxconn, Advocate Aurora Health, Johnson Controls and Northwestern Mutual Create \$100 Million Venture Fund*, MILWAUKEE J. SENTINEL (Aug. 28, 2018), <https://www.jsonline.com/story/money/business/2018/08/28/foxconn-advocate-aurora-health-johnson-controls-and-northwestern-mutual-create-100-million-venture-f/1124290002/> [https://perma.cc/TU55-YXT3].

7. William B. Bonvillian, *Donald Trump’s Voters and the Decline of American Manufacturing*, ISSUES SCI. & TECH., Summer 2016 at 27, 34.

8. *Id.* at 37. A primary example of this model is Apple Inc. *Id.* Apple leads the world with dramatic technological innovations but sends virtually all its production to Asia. *Id.*

consequences.<sup>9</sup> From 2000 to 2010, manufacturing employment in the U.S. fell from seventeen million to under twelve million, a decline of almost one-third.<sup>10</sup> Moreover, the employment trends of this decade were accompanied by drastic declines in manufacturing investment, output, and productivity.<sup>11</sup> In contrast, countries like Germany, Japan, Taiwan, and China use their experiences in manufacturing to inform their research and development, closing gaps in their innovation processes.<sup>12</sup>

To address the U.S.'s manufacturing shortfalls, thereby strengthening the economy and generating technological innovations, advanced manufacturing jobs are needed.<sup>13</sup> Advanced manufacturing jobs are highly skilled, involving both the production of advanced technologies and innovative ways to manufacture existing products.<sup>14</sup> One Foxconn official estimates two-thirds of the promised 13,000 new jobs will be highly skilled positions.<sup>15</sup> Wisconsin, luckily, has anticipated this necessity and already begun training a capable workforce. Publicly, Wisconsin has invested hundreds-of-millions of dollars in workforce development through programs such as Wisconsin Fast Forward (WFF).<sup>16</sup> The WFF alone allocates 500,000 dollars of grants annually for technical education in advanced manufacturing fields.<sup>17</sup> Privately, companies

9. *Id.*

10. *Id.* at 31.

11. *Id.*

12. WILLIAM B. BONVILLIAN & PETER L. SINGER, *ADVANCED MANUFACTURING: THE NEW AMERICAN INNOVATION POLICIES* 8 (2017).

13. SUBCOMM. FOR ADVANCED MFG., NAT'L SCI. & TECH. COUNCIL, *ADVANCED MANUFACTURING: A SNAPSHOT OF PRIORITY TECHNOLOGY AREAS ACROSS THE FEDERAL GOVERNMENT* iii (2016).

14. *Id.* at 2 n.1.

15. Rick Romell, *Foxconn Will Need Thousands of Workers with Entry-Level Skills and a High School Diploma*, MILWAUKEE J. SENTINEL (May 4, 2018), <https://www.jsonline.com/story/money/business/2018/05/04/foxconn-need-thousands-workers-entry-level-skills/578022002/> [<https://perma.cc/6H7B-WHWF>]. These positions include, software engineers, data scientists, IT specialists, technical writers, and high-performance computing developers. *Specialized Hiring*, FOXCONN, <https://recruiting.adp.com/srccar/public/RTI.home?c=2175907&d=ExternalCareerSite> [<https://perma.cc/J9F4-BLUF>] (last visited Nov. 13, 2019).

16. OFFICE OF SKILLS DEVELOPMENT, STATE OF WIS. DEP'T OF WORKFORCE DEV., *Expanded Wisconsin Fast Forward Program: Advanced Manufacturing Technical Education Equipment Grants: Grant Program Guidelines*, 1 (Mar. 1, 2018), [http://www.wisconsinfastforward.com/pdf/18\\_19\\_adv\\_mfg\\_tech\\_edu equip\\_grant\\_program\\_guidelines.pdf](http://www.wisconsinfastforward.com/pdf/18_19_adv_mfg_tech_edu equip_grant_program_guidelines.pdf) [<https://perma.cc/VH87-YP5M>].

17. *Id.* Grants from 5,000 to 50,000 dollars are awarded to Wisconsin schools "for the acquisition of equipment used in advanced manufacturing fields in the workplace, together with any software necessary for the operation of the equipment and any instructional material necessary to train pupils in the operation of the equipment." *Id.* The grant program's guidelines admit to Wisconsin's skilled worker shortage and need to prepare students for success in a "modern, global, and competitive economy." *Id.*

such as Direct Supply<sup>18</sup> and Northwestern Mutual<sup>19</sup> have partnered with Milwaukee universities to establish talent pipelines in technology fields. But, is there a legal design that could be implemented in Wisconsin to attract and retain tech employers?

Once tech employers hire highly skilled employees, two important considerations arise. First, how can the employee be retained to prevent the employer's investment in him or her to benefit a competitor? Second, how can the employer's proprietary information shared with the employee be protected? Non-compete agreements, also known as restrictive covenants or covenants not to compete, are often the solution.<sup>20</sup> This Comment argues that to attract and retain employers in the tech industry, which is vital for growth, Wisconsin should adopt new statutory language<sup>21</sup> and exercise judicial restraint that reconciles interest conflicts between employers, employees, and the public.<sup>22</sup>

This Comment proceeds as follows. Part II examines non-compete agreements generally and in Wisconsin, providing a fundamental understanding of the current law and its function in practice.<sup>23</sup> Part III delves deeper into the use of non-compete agreements by tech employers.<sup>24</sup> This Part will also analyze California's and Massachusetts' approaches to non-compete

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18. Kathleen Gallagher, *Direct Supply Opens Technology Center at MSOE*, MILWAUKEE J. SENTINEL (Sept. 4, 2012), <http://archive.jsonline.com/business/direct-supply-opens-technology-center-at-msoe-mv606ba-168516006.html> [https://perma.cc/WJ68-74WG]. In 2012, Direct Supply, Inc., a provider of equipment and information systems to the senior living industry, opened a technology center on the campus of the Milwaukee School of Engineering. *Id.* The center houses dozens of engineers and students and was described as a "key resource" in the company's attraction and development of tech talent in Milwaukee, WI. *Direct Supply Opens Technology Center at Milwaukee School of Engineering*, LEADING AGE (quoting Bill Avery, Executive Vice President and Chief Information Officer of Direct Supply), <https://www.leadingage.org/direct-supply-opens-technology-center-milwaukee-school-engineering> [https://perma.cc/UM3T-PREN] (last visited Oct. 7, 2019).

19. Nick Williams, *Northwestern Mutual, Marquette and UWM Partner on \$40M Data Science Institute*, MILWAUKEE BUS. J. (June 20, 2018), <https://www.bizjournals.com/milwaukee/news/2018/06/20/northwestern-mutual-marquette-and-uwm-partner-on.html> [https://perma.cc/HZ8A-GP5T]. Northwestern Mutual, a Milwaukee-based insurance giant, agreed in 2018 to not only partner with and provide office space for students and innovators of Marquette University and the University of Wisconsin-Milwaukee, but also to invest fifteen million dollars in data science education and research. *Id.* The universities will also each contribute twelve million dollars in efforts to address Wisconsin's tech needs. *Id.*

20. In a 2011 study, nearly half of survey respondents belonging to the Institute of Electrical and Electronics Engineers said they had been asked to sign a non-compete agreement. Matt Marx, *The Firm Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOC. REV. 695, 702 (2011).

21. See *infra* Appendix A.

22. See *infra* Part IV.

23. See *infra* Part II.

24. See *infra* Part III.

agreements in relation to the states' respective tech climates.<sup>25</sup> Finally, Part IV offers summary analysis and provides detailed recommendations based on the findings of previous sections.<sup>26</sup>

## II. NON-COMPETE AGREEMENTS

### A. Generally

Non-compete agreements have existed in the common law tradition for hundreds of years.<sup>27</sup> The agreements typically have three provisions designed to reduce economic harm to the employer:

(1) the “noncompetition” provision, which prevents an employee from engaging in activities that may, or do, compete with the employer (e.g., working for a competitor or opening a competing business); (2) the “nonsolicitation” provision, which looks to restrict the employee from soliciting the company’s other employees or customers; and (3) the “nondisclosure” or “confidentiality” provision, which seeks to limit an employee’s unauthorized use of confidential, proprietary, or trade secret information.<sup>28</sup>

As for the enforceability of these provisions, fundamentally courts have balanced two interests throughout the agreement’s history: (1) the interest of the business owner in protecting his or her information and customers from immoral competitors and employees; and (2) the interest of the employee to move freely and follow his or her own interests.<sup>29</sup> How courts balanced these

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25. See *infra* Section III.B.

26. See *infra* Part IV.

27. Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 626 (1960). At the beginning of the nineteenth century when guild associations dominated economies, most highly skilled jobs were artisanal in nature and apprentices were expected to eventually become masters relying on the knowledge they acquired. Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800–1920*, 52 HASTINGS L.J. 441, 450 (2001). This master-apprentice relationship inherently protected trade secrets as apprentices pledged to keep techniques secret in return for instruction. *Id.* at 451. Thus, non-compete agreements were not a factor in most of the highly skilled employment market. See *id.* As the nineteenth century went on, the industrial economy replaced the craft economy, gradually changing the rules surrounding the dissemination of knowledge. *Id.* The norms of guilds persisted, however, as these rules developed. *Id.* at 454–55. For example, given the importance of practicing a trade to an artisan’s livelihood, the early laws reacted with hostility to non-compete agreements. *Id.* at 455. However, the potency of these norms declined with time, and by the turn of the twentieth century, non-compete agreements were relatively common as courts recognized and defined employer property interests. *Id.* at 493.

28. Robert J. Orelup & Christopher S. Drewry, *Judicial Review and Reformation of Noncompete Agreements*, CONSTR. LAW., Summer 2009, at 29, 29.

29. Blake, *supra* note 27, at 627.

interests over time ebbed and flowed with the period's social values and business norms, but eventually resulted in a reasonableness standard.<sup>30</sup>

Sometimes referred to as the “rule of reason” test, modern courts generally consider the employer's interests and the impact of their enforcement on the employee's interests and the public's welfare when determining whether the scope of the non-compete agreement is reasonable.<sup>31</sup> Additionally, factors such as duration, geographic scope, and scope of the employee's limitations may be considered to determine reasonableness.<sup>32</sup>

When a non-compete agreement is found to be unreasonable, state courts vary in their response.<sup>33</sup> Some states modify the agreements, rewriting sections of employment contracts if necessary, while others will only strike unreasonable provisions and enforce the rest—the so-called “blue-pencil doctrine.”<sup>34</sup> Still others follow a strict no-modification approach or, in the case of two states, presumptively void non-compete agreements all together.<sup>35</sup>

### B. In Wisconsin

The primary source of non-compete authority in Wisconsin is section 103.465 of the Wisconsin Statutes.<sup>36</sup> According to this statute:

A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any covenant, described in this section, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.<sup>37</sup>

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30. *Id.* at 626–27.

31. J.J. Prescott, Norman D. Bishara & Evan Starr, *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 MICH. ST. L. REV. 369, 379 (2016).

32. Orelup & Drewry, *supra* note 28, at 29–30.

33. *Id.* at 30–44.

34. *Id.* at 30–31.

35. *Id.* at 31–32. The two states that do not permit non-compete agreements are California and North Dakota. CAL. BUS. & PROF. CODE § 16600 (West 2019); N.D. CENT. CODE § 9-08-06 (2019).

36. WIS. STAT. § 103.465 (2015–2016). The statute was enacted in 1957 in response to the Wisconsin Supreme Court's decision in *Fullerton Lumber Co. v. Torborg*, where the court upheld part of what the legislature deemed to be an overly broad non-compete agreement. *Heyde Companies, Inc. v. Dove Healthcare, LLC*, 2002 WI 131, ¶ 11, 258 Wis. 2d 28, 654 N.W.2d 830.

37. WIS. STAT. § 103.465.

The statute indicates that Wisconsin is among the states previously described that follows a strict no-modification approach, meaning if any part of a non-compete agreement is determined to be unreasonable, the entire agreement is void.<sup>38</sup>

Wisconsin case law has provided additional clarity on, and standards for, the statute's application. In *Lakeside Oil Co. v. Slutsky*, the court determined that the Wisconsin statute reflects a strong public policy against the enforcement of unreasonable trade restraints on employees.<sup>39</sup> The Wisconsin Supreme Court further established that courts will only enforce non-compete agreements if they (1) are necessary to protect the employer; (2) provide a reasonable time limit; (3) provide a reasonable territorial limit; (4) are not harsh or oppressive to the employee; and (5) are not contrary to public policy.<sup>40</sup>

Subsequent cases broke these five *Lakeside* elements down and further framed reasonableness in the context of non-competes. As for the first element, the court in *Lakeside* said: "An employer is not entitled to be protected against legitimate and ordinary competition of the type that a stranger could give. There must be some additional special facts and circumstances which render the restrictive covenant reasonably necessary for the protection of the employer's business."<sup>41</sup> In *Wausau Medical Center, S.C. v. Asplund*, the court held that non-compete agreements are more likely to be necessary for the employer's protection if following factors exist: the business is based on customer contacts; the employee has access to confidential information; the employee's reputation was established through work with the former employer; and the employee obtained unique skills through the work with the former employer.<sup>42</sup>

With respect to time limits, the second *Lakeside* element, reasonableness depends on the period required to "obliterate" the customer's identification of the employee with the employer.<sup>43</sup> Many cases have indicated that two years or less is reasonable.<sup>44</sup> Moving to the third element, courts have confined territorial limits by considering the area of the employer's business, especially with respect to where the employee works, the nature of the employer's products, and any other factors the court deems relevant.<sup>45</sup>

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38. *See id.*

39. 8 Wis. 2d 157, 162, 98 N.W.2d 415, 418-19 (1959).

40. *Id.*

41. *Id.* at 163.

42. 182 Wis. 2d 274, 287-90, 514 N.W.2d 34, 40-41 (Ct. App. 1994).

43. *Lakeside*, 8 Wis. 2d at 164-65.

44. *See* *Chuck Wagon Catering, Inc. v. Raduege*, 88 Wis. 2d 740, 754, 277 N.W.2d 787, 793 (1979); *Fields Found., Ltd. v. Christensen*, 103 Wis. 2d 465, 479, 309 N.W.2d 125, 133 (Ct. App. 1981).

45. *Lakeside*, 8 Wis. 2d at 165-66.



To determine if a non-compete is harsh or oppressive on an employee, the Wisconsin Supreme Court in *Rollins Burdick Hunter of Wisconsin, Inc. v. Hamilton* evaluated the extent to which a non-compete inhibited the employee's ability to "pursue a livelihood in that enterprise, as well as the particular skills, abilities, and experience of the employee sought to be restrained."<sup>46</sup> The court here continued by emphasizing the factors it listed could not be exhaustive, and the reasonableness of the fourth *Lakeside* element must be considered with the totality of the circumstances in mind.<sup>47</sup> Finally, as to the last *Lakeside* element, public policy can generally be expressed by statute, administrative regulation, or by courts through the establishment of common law.<sup>48</sup> Public policy with respect to non-compete agreements in Wisconsin is framed primarily by common law, with courts considering whether enforcing the agreement would stifle competition and create a shortage of employees based on previous decisions.<sup>49</sup>

In addition to the Wisconsin statutory requirements and the case law thereunder, the state's Supreme Court applies the following canons of constructing to non-compete agreements: "(1) [non-compete agreements] are prima facie suspect; (2) they must withstand close scrutiny to pass legal muster as being reasonable; (3) they will not be construed to extend beyond their proper import or further than the language of the contract absolutely requires; and (4) they are to be construed in favor of the employee."<sup>50</sup>

While non-compete agreements typically have three provisions,<sup>51</sup> section 103.465 of the Wisconsin Statutes appears to have been drafted with only the noncompetition provision in mind.<sup>52</sup> With respect to the non-solicitation and confidentiality provisions, Wisconsin law presents a confusing picture.<sup>53</sup>

Non-solicitation provisions within non-compete agreements are still governed by section 103.465, which requires an express territorial limitation for the agreement to be reasonable.<sup>54</sup> In operation, however, customer

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46. 101 Wis. 2d 460, 470, 304 N.W.2d 752, 757 (1981).

47. *Id.*

48. *Heyde Companies, Inc. v. Dove Healthcare, LLC*, 2002 WI 131, ¶ 10, 258 Wis. 2d 28, 654 N.W.2d 830.

49. *Lakeside*, 8 Wis. 2d at 166–67.

50. *Farm Credit Servs. of N. Cent. Wis., ACA v. Wysocki*, 2001 WI 51, ¶ 9, 243 Wis. 2d 305, 627 N.W.2d 444.

51. Non-compete agreements typically have noncompetition, non-solicitation, and confidentiality provisions. *Orelup & Drewry*, *supra* note 28, at 29.

52. James W. McNeilly, Jr. & Darla A. Krzoska, *Protecting Business Interests with Covenants Not to Compete*, WIS. LAW., May 2006, at 12, 60.

53. *Id.*

54. Bradden C. Backer & John J. Kalter, *Wisconsin Courts Struggle with Geography in Nonsolicitation Agreements*, WIS. LAW., Feb. 2002, at 10, 10, 60 n.2.

limitations only implicitly set territorial limitations.<sup>55</sup> “The customers subject to a [non-solicitation provision] conduct business with the employer within a defined, albeit changing, territory. The absence of an explicit territorial limitation, accordingly, does not leave the [non-solicitation provision] with an unlimited geographic scope.”<sup>56</sup> Following its decision in *Chuck Wagon Catering Inc. v. Raduege*,<sup>57</sup> where the Wisconsin Supreme Court accepted customer limitations as reasonable, the court entertained arguments in *Farm Credit Services of North Central Wisconsin, ACA v. Wysocki* and *Equity Enterprises Inc. v. Milosch* that challenged the territorial scope of customer limitations in non-solicitation clauses, and made conflicting decisions.<sup>58</sup> The decisions in these cases have created confusion among practitioners as to whether territorial limitations are needed separately from express customer limitations.<sup>59</sup>

Confidentiality provisions under Wisconsin non-compete law also create confusion in practice. With the exception of agreements also protecting intellectual property,<sup>60</sup> agreements protecting information that qualifies as a trade secret<sup>61</sup> and information that does not so qualify, are also subject to section

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55. *Id.* at 12.

56. *Id.* at 12–13.

57. 88 Wis. 2d 740, 277 N.W. 2d 787 (1979). In this case, the court upheld a non-solicitation provision that prohibited an employee from soliciting customers along the same delivery route of his employer, though there was no territorial limitation per se. *Id.* at, 745–47, 757. The court stated, “[i]n Wisconsin a [non-compete agreement] is considered reasonable as to territory if, like this [agreement], it is limited to the route or customers defendant actually services.” *Id.* at 754.

58. *Farm Credit Servs. of N. Cent. Wis., ACA v. Wysocki*, 2001 WI 51, ¶ 1, 243 Wis. 2d 305, 627 N.W.2d 444 (finding that a non-solicitation provision that prohibited an employee from performing services for customers the employee serviced for a set period was not invalid on its face because the covenant was narrowly tailored to a customer list). *Equity Enters. Inc. v. Milosch*, 2001 WI App 186, ¶ 15, 247 Wis. 2d 172, 633 N.W.2d 662 (ruling against a non-solicitation provision that prohibited the employee from doing business with any customer of the employer for a period by faulting the provision’s lack of territorial limit).

59. *McNeilly & Krzoska*, *supra* note 52, at 58.

60. *See IDX Sys. Corp. v. Epic Sys. Corp.*, 285 F.3d 581, 585 (7th Cir. 2002) (“The parties have not cited, and we have not found, any Wisconsin statute or decision subjecting non-disclosure agreements between suppliers and users of intellectual property to the rules that govern non-competition clauses between employers and employees. To the contrary, . . . [s]ection 134.90(6)(b)1 implies that contracts about intellectual property are valid, even when they exceed the domain of trade secrets.”).

61. According to Wisconsin’s Uniform Trade Secrets Act, a trade secret means “information, including a formula, pattern, compilation, program, device, method, technique or process to which all of the following apply: (1) The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; (2) The information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances.” WIS. STAT. § 134.90(c) (2017–2018).

103.465 of the Wisconsin Statutes and the five-part *Lakeside* test.<sup>62</sup> Under Wisconsin's Uniform Trade Secrets Act, however, trade secrets are protected without respect to time or territorial limits.<sup>63</sup> Yet, under section 103.465, if trade secrets and information that does not qualify as a trade secret are protected under a single clause without time and territorial limits, the agreement is unreasonable and, therefore, void in its entirety.<sup>64</sup> Information that does not qualify as a trade secret<sup>65</sup> is not always easy to distinguish from information that does and can present a threat to the employer from anywhere in the world for an extended period of time.<sup>66</sup> Therefore, in the interest of the employer, non-trade secret information should never be disclosed, yet non-compete agreements without a time limit are per se unreasonable.<sup>67</sup> The confusion, then, rests in making agreements that fully protect the employer's proprietary information from competitors, but also complies with section 103.465 of the Wisconsin Statutes.<sup>68</sup>

Some may argue that confidentiality provisions in non-compete agreements should simply be supplemented with non-disclosure agreements (NDAs), but in practice, this solution provides less protection for an employer.<sup>69</sup> While NDAs are common, their compliance is far more difficult to track than non-competes, as it is easier to determine whether a former employee is working for another company than to establish that an employee is sharing confidential information.<sup>70</sup> Furthermore, Wisconsin has not ruled on whether the inevitable

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62. McNeilly & Krzoska, *supra* note 52, at 57.

63. *Id.*

64. *Id.*

65. This can include any information under the wide umbrella of confidential information that is not considered a trade secret under section 134.90 of the Wisconsin Statutes. *See* § 134.90. The process of determining whether information is a trade secret under section 134.90 of the Wisconsin Statutes is a fact-intensive process that relies on several factors: (1) extent to which the information is known externally; (2) extent to which the information is known internally; (3) measures taken to guard secrecy; (4) the value of the information to the business and its competitors; (5) amount of money and effort spent developing the information; and (6) the ease or difficulty the information could be properly acquired or duplicated. *Genzyme Corp. v. Bishop*, 463 F. Supp. 2d 946, 949 (W.D. Wis. 2006). Given these many factors, a business may have difficulty determining what information may not be a trade secret and, therefore, purposely or mistakenly make non-compete agreements protecting both trade secret and non-trade secret information with the same language.

66. McNeilly & Krzoska, *supra* note 52, at 57–58.

67. Ralph Anzivino, *Drafting Restrictive Covenants in Employment Contracts*, 94 MARQ. L. REV. 499, 529 (2010).

68. *See* McNeilly & Krzoska, *supra* note 52, at 57–58.

69. *See* Matt Marx & Lee Fleming, *Non-compete Agreements: Barriers to Entry . . . and Exit?*, 12 INNOVATION POL'Y & ECON 39, 42 (2012).

70. *Id.*

disclosure doctrine, as detailed in *PepsiCo, Inc. v. Redmond*,<sup>71</sup> allows an employer to prove trade secret misappropriation simply by demonstrating that a former employee's new employment will inevitably lead to disclosure.<sup>72</sup> A ruling in conjunction with *PepsiCo* would make the violation of NDAs easier to prove. But since this ruling does not exist and violations of NDAs are harder to track, non-compete agreements with confidentiality provisions satisfy the information security needs of employers better than non-disclosure agreements.

To summarize the many intricacies of Wisconsin non-compete law, Timothy Nettesheim and Larri Broomfield explain several paradigms in their article "Restrictive Covenants and the Wisconsin Service Professional."<sup>73</sup> Their piece warns practitioners of making agreements broad, restricting employees from larger than necessary territories, and forgetting to spell out non-solicitation and confidentiality specifics.<sup>74</sup> Overall, it is a cautionary tale, reflecting the state of non-compete law in Wisconsin. In Part IV, this Comment will discuss the strengths and weaknesses of the state's non-compete law further. But, to understand how these laws must change to attract high-tech employers, first the interests of these employers and the policies of other states must be thoroughly examined.

### III. HIGH-TECH EMPLOYERS AND NON-COMPETE AGREEMENTS

"High technology," or "high tech," is defined as "scientific technology involving the production or use of advanced or sophisticated devices."<sup>75</sup> These employers have several attributes:

First, high tech [employers] are labor intensive rather than capital intensive in their production processes; [s]econd, they employ a higher percentage of technicians, engineers, and scientists than other industries; they are science based and consequently apply to the marketplace scientific advances in the form of new products and production methods; and third, research and development are critical to the continued success

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71. 54 F.3d 1262, 1269 (7th Cir. 1995) ("[A] plaintiff may prove a claim of trade secret misappropriation by demonstrating that defendant's new employment will inevitably lead him to rely on the plaintiff's trade secrets.").

72. *Clorox Co. v. S.C. Johnson & Son, Inc.*, 627 F. Supp. 2d 954, 967 (E.D. Wis. 2009).

73. Timothy A. Nettesheim & Larri J. Broomfield, *Restrictive Covenants and the Wisconsin Service Professional*, WIS. LAW., Feb. 1993, at 20, 21–23.

74. *Id.*

75. *High Technology*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/high%20technology> [<https://perma.cc/9BG4-CZYY>] (last visited Oct. 9, 2019).

of high-technology ventures.<sup>76</sup>

Employers of this nature are in many industries, such as retail, transportation, national defense, and medicine.<sup>77</sup> As discussed,<sup>78</sup> certain manufacturers also rise to this distinction. These manufacturers focus on producing technology with technology, and rely on innovation to drive their production of high-tech goods.<sup>79</sup> Hubs of these rapidly growing entities have sprouted up in places like Silicon Valley, Seattle, Boston, and Austin, just to name a few.<sup>80</sup> They have unique interests in an ever-advancing field, and the states they call home have addressed these interests in different ways—at least in the context of non-competes. This section will discuss high-tech employers generally, as the employers on this spectrum have common interests and are usually not distinguished in legal contexts.

#### A. *Interests of High-Tech Employers*

There are two principal interests of high-tech employers, like most employers, when they learn an employee is departing: (1) limiting competition and (2) protecting secrets.<sup>81</sup> Limiting competition, the first of these interests, means preventing former employees from creating more competition for the employer by working for a competitor or starting their own ventures in the industry.<sup>82</sup> While anti-competitive practices that restrain trade have long been outlawed under U.S. law,<sup>83</sup> this primal business instinct nevertheless persists. The high-tech industry is a significant source of today's innovation,

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76. WILLIAM W. FALK & THOMAS A. LYSON, *HIGH TECH, LOW TECH, NO TECH: RECENT INDUSTRIAL AND OCCUPATIONAL CHANGE IN THE SOUTH* 47 (1988).

77. *Id.* at 45–47.

78. *See supra* text accompanying notes 13–15.

79. *What is High-Tech Manufacturing?*, EAGLE TECH., <https://eagletechnologies.com/what-is-high-tech-manufacturing/> [<https://perma.cc/9VZJ-785D>] (last visited Oct. 7, 2019). Examples of these employers include, Samsung, Texas Instruments, and Intel. *See Consumer Electronics*, SAMSUNG, <https://www.samsung.com/us/aboutsamsung/business-area/consumer-electronics/> [<https://perma.cc/936T-TYP7>] (last visited Oct. 7, 2019); *Technology & Manufacturing*, TEXAS INSTRUMENTS, <http://www.ti.com/about-ti/company/technology-manufacturing.html> [<https://perma.cc/D4X4-QTT7>] (last visited Oct. 30, 2019); *Company Overview*, INTEL, <https://www.intel.com/content/www/us/en/company-overview/company-overview.html> [<https://perma.cc/3KT5-XTYE>] (last visited Oct. 7, 2019).

80. Karsten Strauss, *America's Biggest Tech Hubs, by the Jobs*, FORBES (Jul. 26, 2017), <https://www.forbes.com/sites/karstenstrauss/2017/07/26/americas-biggest-tech-hubs-by-the-jobs/#a0611192f150> [<https://perma.cc/K5TP-KHJS>].

81. Marx & Fleming, *supra* note 69, at 41–42.

82. Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L. J. 1127, 1149 (2009).

83. *See* 15 U.S.C. § 1 (2000) (originating from the Sherman Antitrust Act of 1890).

necessitating large investments in research and development by its players.<sup>84</sup> Investments are made not just in the processes and products, but also in the employees who conceive and execute them.<sup>85</sup> In addition to the expertise gained from on-the-job experience, high-tech employees have been seen to benefit from their employer's provision of long-term mentorship, advanced training, and rewards for intellectual curiosity.<sup>86</sup> Employees in the high-tech industry and the knowledge, or the coherent mix of obtained information and experience, they have, therefore, are strategic assets exceptionally valuable to a competitor.<sup>87</sup>

The second interest of high-tech employers, protecting secrets, follows from the first. In the innovation driven industry, preserving trade secrets and other proprietary information allows a high-tech employer to maintain their market position and competitive advantage over peers who do not have the information.<sup>88</sup> Simply put, the more competitors who know the information, the lower its value, with the value disappearing entirely when the information no longer becomes a relative secret.<sup>89</sup> Programs and devices as well as manufacturing processes, methods, and techniques that derive value have the potential to be trade secrets under Wisconsin law<sup>90</sup> if high-tech manufacturers take steps to treat them as so.<sup>91</sup> Other confidential and proprietary information

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84. Agnieszka Zakrzewska-Bielawska, *High Technology Company – Concept, Nature, Characteristics*, in RECENT ADVANCES IN MANAGEMENT, MARKETING, FINANCES 93, 93 (2010).

85. *Id.* at 94.

86. See Andreas Rekdal, *4 Chicago Tech Companies Making Professional Development a Priority*, BUILT IN CHICAGO (June 8, 2017), <https://web.archive.org/web/20170623110214/https://www.builtinchicago.org/2017/06/07/chicago-companies-support-professional-development> [<https://perma.cc/JL3G-SHYG>].

87. Zakrzewska-Bielawska, *supra* note 84, at 95.

88. MAGDALENA KOLASA, *TRADE SECRETS AND EMPLOYEE MOBILITY: IN SEARCH OF AN EQUILIBRIUM* 8 (2018).

89. *Id.*

90. See WIS. STAT. § 134.90(c) (2017–2018); Daniel C. Norris, *Manufacturing a Trade Secret*, INDUS. TODAY (2014), <https://industrytoday.com/article/manufacturing-a-trade-secret/> [<https://perma.cc/RA28-MXSR>] (compelling manufactures to critically examine their manufacturing equipment, processes, or systems for enforceable trade secrets).

91. The Uniform Trade Secret Act requires information to be “subject of efforts to maintain its secrecy” in order to qualify as a trade secret. WIS. STAT. § 134.90. When considering this element, courts consider several factors, including: “(1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and to [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.” *Minuteman, Inc. v. Alexander*, 147 Wis. 2d 842, 851, 434 N.W.2d 773, 777 (1989) (quoting *Corroon & Black-Rutters & Roberts, Inc. v. Hosch*, 109 Wis. 2d 290, 295, 325 N.W.2d 883, 886 (1982)).

that does not meet the strict statutory guidelines may also be worthy of protection.<sup>92</sup>

Non-compete agreements serve to promote both interests. First, they restrict the practice of a particular trade in a certain geographic area for a given time, which blocks competitors from accessing valuable employees.<sup>93</sup> Competitors will be wary of attempting to hire employees who have pre-existing non-competes, even if they believe the agreements are unenforceable, because of the length of time the new employee will be unable to work and the legal fees associated with a potential tortious interference suit.<sup>94</sup> Furthermore, non-solicitation and confidentiality provisions protect an employer's customers, trade secrets, and other proprietary information, supporting employers' second interest.<sup>95</sup> The security of knowing their interests will be satisfied when an employee signs a non-compete, allows high-tech employers to confidently increase investment in their workforce.<sup>96</sup>

Non-compete agreements also have advantages beyond those that address a high-tech employer's interests when an employee moves. One of the most significant of these advantages is that non-competes discourage employees from leaving in the first place.<sup>97</sup> Understandably, most employees cannot afford to abstain from working in their desired trade for one to three years, as many non-compete agreements require.<sup>98</sup> Even if the employee believes that the agreement is unenforceable, the cost of fighting his or her employer's breach of contract suit, would be a significant deterrent.<sup>99</sup> However, it is uncommon for employees to believe an agreement is unenforceable because the regularity of non-competes causes many to assume their validity and forgo the use of legal counsel when considering departure.<sup>100</sup> By keeping their valuable employees, high-tech employers benefit by avoiding costs associated with turnover and recruitment.<sup>101</sup> Given the plethora of interests non-competes can address, state non-compete laws are particularly relevant to high-tech employers.

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92. See McNeilly & Krzoska, *supra* note 52, at 57.

93. Marx & Fleming, *supra* note 69, at 51.

94. Griffin Toronjo Pivateau, *Enforcement of Noncompetition Agreements: Protecting Public Interests Through an Entrepreneurial Approach*, 46 ST. MARY'S L.J. 483, 489 (2015).

95. *Id.* at 488.

96. *Id.*

97. *Id.* at 489.

98. *Id.*

99. Sullivan, *supra* note 82, at 1137. The author compares the litigation of unenforceable non-compete agreements to a game of chicken. *Id.* at 1137–38.

100. *Id.* at 1136.

101. Marx & Fleming, *supra* note 69, at 51.

### B. State Non-Compete Law and High-Tech Employers

As discussed, courts and legislatures have balanced the interests of employers and employees, as well as society, when determining the power of non-compete agreements in their states.<sup>102</sup> While the acceptable degree is subject to debate, most can agree that employers should have the right to protect themselves from unfair competition.<sup>103</sup> Furthermore, some argue that enforcing non-competes is essential to preserving one's freedom to contract.<sup>104</sup> This being said, there are significant policy concerns surrounding the use of non-compete agreements. Namely, the hindrance of an employee's right to move freely in the market.<sup>105</sup> Courts have promoted an employee's right to choose a livelihood utilizing his or her own knowledge and skills:

The average individual employee has little but his labor to sell or to use to make a living. He is often in urgent need of selling it and in no position to object to boilerplate [non-compete agreements] placed before him to sign. To him, the right to work and support his family is the most important right he possesses.<sup>106</sup>

While a business may invest more in an employee who has signed a non-compete,<sup>107</sup> if that employee leaves, he or she will be prevented from starting new, potentially innovative ventures, which is a disservice to the public and the economy.<sup>108</sup>

As is the case with many legal issues, a great deal of variation exists among non-compete laws in states. California and North Dakota are the only two states to ban them outright,<sup>109</sup> while states like Texas and Florida have reputations for placing few limits on the use of non-competes.<sup>110</sup> For this Comment's

102. See *supra* text accompanying notes 29–30.

103. Pivateau, *supra* note 94, at 490.

104. *Id.*

105. ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING 64 (2013). This stems, at least in part, from an historic antipathy for contracting oneself into involuntary servitude. Abigail Shechtman Nicandri, Comment, *The Growing Disfavor of Non-Compete Agreements in the New Economy and Alternative Approaches for Protecting Employers' Proprietary Information and Trade Secrets*, 13 U. PA. J. BUS. L. 1003, 1004 n.3 (2011).

106. *Arthur Murray Dance Studios of Cleveland v. Witter*, 105 N.E.2d 685, 704 (Ohio Ct. Com. Pl. 1952).

107. See *supra* text accompanying note 95.

108. Steven Greenhouse, *Noncompete Clauses Increasingly Pop Up in an Array of Jobs*, N.Y. TIMES (June 8, 2014), [https://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html?hpw&rref=business&module=Search&mabReward=relbias%3Ar&\\_r=0](https://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html?hpw&rref=business&module=Search&mabReward=relbias%3Ar&_r=0) [https://perma.cc/9FFP-ZDN6].

109. CAL. BUS. & PROF. CODE § 16600 (West 2019); N.D. CENT. CODE § 9-08-06 (2019).

110. Greenhouse, *supra* note 108.



purposes, the decisions of states regarding non-competes in relation to their high-tech employer residents is of primary interest. California and Massachusetts are arguably the most relevant to compare.<sup>111</sup> The states are each home to established hubs of high-tech employers, respectively located in Silicon Valley<sup>112</sup> and Route 128,<sup>113</sup> that benefit from the nearby talent pools of San Francisco, Stanford, and Berkeley in California and Boston, Harvard, and MIT in Massachusetts.<sup>114</sup> The states also have very different non-compete laws, with California banning the agreements<sup>115</sup> and Massachusetts not.<sup>116</sup>

### 1. California

First, California. According to section 16600 of the California Business and Professions Code, “every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void,”<sup>117</sup> except with regard to the sale of a business.<sup>118</sup> The ban is almost as old as the state itself and has been repeatedly affirmed, with some courts even going as far as to hold employers liable for punitive damages when they are found using non-competes.<sup>119</sup> When jurisdictional battles arise, and they often do given the uncompromising rule, California outright refuses to recognize the non-compete laws of other states and rejects choice of law clauses that attempt

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111. Another state of interest is Hawaii, as it is the only state to explicitly direct its non-compete law at high-tech employers. In 2015, a bill was signed into law barring non-compete agreements “relating to an employee of a technology business.” 2015 Haw. Sess. Laws 516. The bill defines “technology business” as one that “derives the majority of its gross income from sale or license of products or services resulting from its software development or information technology development, or both.” *Id.* The legislature found non-compete agreements to:

impede the development of technology businesses within the State by driving skilled workers to other jurisdictions and by requiring local technology businesses to solicit skilled workers from out of the State. Eliminating [non-compete agreements] for employees of technology businesses will stimulate Hawaii’s economy by preserving and providing jobs for employees in this sector and by providing opportunities for those technology employees to establish new technology companies and new job opportunities in the State.

*Id.* at 514.

112. ALAN HYDE, WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH-VELOCITY LABOR MARKET 3 (2003).

113. SUSAN ROSEGRANT & DAVID R. LAMPE, ROUTE 128: LESSONS FROM BOSTON’S HIGH-TECH COMMUNITY 108 (1992).

114. LOBEL, *supra* note 105, at 67.

115. CAL. BUS. & PROF. CODE § 16600 (West 2019).

116. *See* 2018 Mass. Acts ch. 228. While there are limitations placed on non-compete agreements, the states relatively new law does not ban the agreements outright. *Id.*

117. CAL. BUS. & PROF. CODE § 16600 (West 2019).

118. *Id.* § 16601.

119. LOBEL, *supra* note 105, at 64–65.

to move the contract out of the state's reach.<sup>120</sup> The law, and its enforcement, reflects the state's belief that employee mobility is paramount to its economy.<sup>121</sup>

One of the greatest drivers of this Golden State economy emerged on the strip of land between San Jose and San Francisco now known as Silicon Valley.<sup>122</sup> There, in the 1940s and 1950s, dean of Stanford's engineering school Fredrick Terman encouraged his Stanford University counterparts to start companies, resulting in the beginnings of giants like Hewlett-Packard and Varian Associates.<sup>123</sup> Over the next several decades, start-ups and established technology firms, fueled by the students of nearby universities like Stanford and the University of California, Berkeley,<sup>124</sup> created a hub of innovation that now employs over 1.6 million people and sees more than 19 billion dollars' worth of venture capital investments within its borders.<sup>125</sup> One group of scholars describes the prevailing philosophy of Silicon Valley as promoting "openness, learning, sharing of information, [and] the co-evolution of ideas."<sup>126</sup> While firms intensely compete, they also learn from each other in the "collaborative" Valley with "porous" boundaries between employers.<sup>127</sup> An engineer in Silicon Valley summed up the local mentality by saying "there's far greater loyalty to one's craft than to one's company. A company is just a vehicle that allows you to work."<sup>128</sup>

Much can be attributed to Silicon Valley's success, but some argue California's non-compete law is an essential piece.<sup>129</sup> Given the restraints of section 16600, employers in Silicon Valley learned early that they were unable to contractually prevent their employees from leaving for a competitor or starting solo ventures.<sup>130</sup> This resulted in high velocity employment, or a "labor

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120. *Id.* at 66. In addition to rejecting non-compete clauses, courts in California recently began also rejecting non-solicitation clauses because they restrain trade. *AMN Healthcare, Inc. v. Aya Healthcare Servs., Inc.*, 239 Cal. Rptr. 3d 577, 581 (Ct. App. 2018).

121. LOBEL, *supra* note 105, at 64.

122. Francine Hardaway, *From the Field: A Short History of Silicon Valley*, in *MEDIA INNOVATION AND ENTREPRENEURSHIP* 367, 367 (Michelle Ferrier & Elizabeth Mays eds., 2017).

123. *Id.*

124. LOBEL, *supra* note 105, at 67.

125. *Silicon Valley Data*, SILICON VALLEY INDICATORS, <https://siliconvalleyindicators.org/data/> [<https://perma.cc/W9QC-DDLH>] (last visited Oct. 9, 2019).

126. Chong-Moon Lee, William F. Miller, Marguerite Gong Hancock, & Henry S. Rowen, *The Silicon Valley Habitat*, in *THE SILICON VALLEY EDGE: A HABITAT FOR INNOVATION AND ENTREPRENEURSHIP* 1, 6 (Chong-Moon Lee, William F. Miller, Marguerite Gong Hancock, & Henry S. Rowen eds., 2000).

127. ANNALEE SAXENIAN, *REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128* 2–3 (1994).

128. *Id.* at 36.

129. See Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 593 (1999).

130. *Id.* at 608.

market in which job changes are frequent and employees do not expect to ever make careers inside a single employer,”<sup>131</sup> and an ensuing distribution of employee knowledge.<sup>132</sup> This reality, some argue, prompted the Valley’s unorthodox culture of cooperative competition.<sup>133</sup> Furthermore, they argue that the spillovers of knowledge caused the hub to repeatedly reset its production cycles, resulting in profound innovation.<sup>134</sup>

So, is refusing to enforce non-competes all there is to ending fiercely self-interested and anti-competitive business behavior? Not quite. While yes, the successes in California are significant, it is not all sunshine, rainbows, and collaboration in Silicon Valley. In 2010, Adobe Systems, Apple, Google, Intel, Intuit, and Disney’s Pixar were accused of uncompetitive hiring practices when they agreed not to poach one another’s employees.<sup>135</sup> The employers settled the federal lawsuit quietly,<sup>136</sup> but faced criticism when an order rejecting their settlement in the class-action suit revealed “‘ample evidence’ that Silicon Valley was engaged in ‘an overarching conspiracy’ against its own employees.”<sup>137</sup> Emails and affidavits unveiled a ring led by Apple Inc. founder Steve Jobs that aggressively sought to limit the movement of employees and had been doing so successfully for several years.<sup>138</sup> A Google executive testified that Steve Jobs threatened “war” if a single Apple employee was hired.<sup>139</sup> Over 64,000 technical employees who were affected by the hiring practices were eligible for the class and to receive more than three billion dollars collectively in damages.<sup>140</sup> While the case is not a reflection of all

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131. HYDE, *supra* note 112, at 3.

132. Gilson, *supra* note 129, at 608.

133. *Id.* at 608–09.

134. *Id.* at 609.

135. Ben Rooney, *Six Tech Giants Settle DOJ Hiring Lawsuit*, CNN MONEY (Sept. 24, 2010, 6:01 PM), [https://money.cnn.com/2010/09/24/technology/DOJ\\_tech\\_firms\\_settle\\_hiring\\_charges/?iid=EL](https://money.cnn.com/2010/09/24/technology/DOJ_tech_firms_settle_hiring_charges/?iid=EL) [https://perma.cc/M6TR-65AR].

136. *Id.*

137. David Streitfeld, *Court Rejects Deal on Hiring in Silicon Valley*, N.Y. TIMES (Aug. 9, 2014), <https://www.nytimes.com/2014/08/09/technology/settlement-rejected-in-silicon-valley-hiring-case.html> [https://perma.cc/P3VQ-2PCL].

138. *In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02509-LHK, at \*6 (N.D. Cal. Aug. 8, 2014) (order denying plaintiff’s motion for preliminary approval of settlements).

139. *Id.* at \*7.

140. James O’Toole, *Silicon Valley Firms Accused of Hiring Conspiracy*, CNN BUSINESS (Apr. 21, 2014, 5:40 PM), <https://money.cnn.com/2014/04/21/technology/enterprise/silicon-valley-hiring/index.html> [https://perma.cc/P7X3-9WR4]. The August order rejected a settlement of 325 million dollars, but the case was dismissed in September of 2015 following a court accepted settlement. *In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02509-LHK (N.D. Cal. Sept. 2, 2015) (order granting plaintiff’s motion for final approval of settlement). According to the settlement website, a settlement of 415 million dollars was reached with Adobe, Apple, Google, and Intel in addition to the

companies in Silicon Valley, it indicates that non-compete laws do not change the interests of firms in limiting competition and protecting secrets.

## 2. Massachusetts

Moving on to Massachusetts. The governing law in Massachusetts is chapter 228 of the 2018 Session Laws.<sup>141</sup> However, because the law is relatively new and only applies to non-compete agreements entered into on or after October 1, 2018,<sup>142</sup> it is not the best source to analyze in relation to Massachusetts's seven-decade old tech industry hub.<sup>143</sup> Instead, the common law traditions that governed Massachusetts's non-competes pre-October 1, 2018 must be examined. Massachusetts courts began by upholding non-compete agreements on the grounds that contracts made freely should be enforced.<sup>144</sup> But later, and for much of its modern history, the state followed a general rule that the agreement would be enforced if: "(1) it is necessary to protect a legitimate business interest of the employer; (2) it is reasonably limited in time and space; and (3) it is consonant with the public interest."<sup>145</sup>

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20-million-dollar settlement reached with the other defendants. HIGH-TECH EMPLOYEE ANTITRUST SETTLEMENT, <http://www.hightechemployee lawsuit.com/> [<https://perma.cc/Z6XZ-3YBE>] (last visited Oct. 7, 2019).

141. 2018 Mass. Acts ch. 228. This bill was passed after years of debate and reflects a compromise between "those who believe [non-competes] should be abolished because they are fundamentally unfair to employees and bad for the Massachusetts economy, and those who believe [non-competes] serve a legitimate business purpose when used in a reasonable manner." Michael Rosen, *MA Legislature Passes Noncompete Reform Bill*, MASS. NONCOMPETE LAW (Aug. 1, 2018), <http://www.massachusettsnoncompetelaw.com/2018/08/ma-legislature-passes-noncompete-reform-bill/> [<https://perma.cc/H8QB-9T5R>]. Section 24L of the act requires non-compete agreements in the state to meet eight requirements: (1) be in writing, signed, and expressly state the employee has a right to counsel; (2) if entered into after being hired, provide "fair and reasonable consideration independent from the continuation of employment"; (3) not be broader than necessary to protect an employer's trade secret, confidential information, and goodwill; (4) not last more than one year; (5) provide a reasonable geographic area that does not exceed the area the employee had a material presence in during the last two years of employment; (6) provide a reasonable scope that is limited to types of services provided by the employee during the last two years of employment; (7) provide a "garden leave" clause, which requires the employer to pay fifty-percent of the employee's highest annualized base salary for the restricted period; and (8) "be consonant with public policy." 2018 Mass. Acts ch. 228 § 24L(b).

142. 2018 Mass. Acts ch. 228.

143. ALAN R. EARLS, *ROUTE 128 AND THE BIRTH OF THE AGE OF HIGH TECH* 7 (2002).

144. Laurence H. Reece, III, *Employee Non-Competition Agreements and Related Restrictive Covenants: A Review and Analysis of Massachusetts Law*, 76 MASS. L. REV. 2, 4 (1991); e.g., Becker Coll. of Bus. Admin. & Secretarial Sci. v. Gross, 183 N.E. 765, 766 (Mass. 1933).

145. Reece, *supra* note 144, at 4; e.g., Analogic Corp. v. Data Translation, Inc., 358 N.E.2d 804, 807 (Mass. 1976) ("It is well settled in this Commonwealth that a [non-compete agreement] will be enforced if it 'is reasonably limited in time and space, and is consonant with the public interest.'" (quoting Novelty Bias Binding Co. v. Shevrin, 175 N.E.2d 374, 376 (Mass. 1961))); Marine Contractors Co., Inc. v. Hurley, 310 N.E.2d 915, 920 (Mass. 1974) ("Employee [non-compete

The state construes the agreements against the employer<sup>146</sup> and scrutinizes them carefully.<sup>147</sup>

Massachusetts courts also consider public policy factors when determining whether to enforce non-compete agreements.<sup>148</sup> In this exercise, courts encountered a school of thought that argues high-velocity employment causes an over-abundance of start-up companies, which then weakens the base of knowledge and prevents industry innovation.<sup>149</sup> Scholars Richard Florida and Martin Kenney argue:

Hypermobility . . . creates the vexing condition of individual benefits pitted against “social” costs—costs that are passed on to other individuals, other firms, or the economy at large. These costs can be separated into four related categories: (1) the disruption of ongoing [research and development] efforts, (2) a sacrifice of “institutional memory,” (3) loss of investment and subsequent underinvestment in human resources, and (4) extreme career compression leading to high rates of worker burnout.<sup>150</sup>

While this theory *alone* has not been entirely persuasive in Massachusetts, trial courts pre-chapter 228 generally upheld or modified non-compete agreements, consequentially restricting employee movement.<sup>151</sup> Furthermore, cost prohibitions limited the number of cases that were brought to appellate courts, and those that did often went unreported.<sup>152</sup>

One area greatly affected by these pre-chapter 228 non-compete decisions was Route 128. This fifty-five mile stretch of highway connecting the Boston suburbs from north to south, began as “the Road to Nowhere,” but by the late

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agreements] generally are enforceable only to the extent that they are necessary to protect the legitimate business interests of the employer.”); *Alexander & Alexander, Inc. v. Danahy*, 488 N.E.2d 22, 29 (Mass. App. Ct. 1986) (“[A]ny [non-compete agreement] is to be enforced only to the extent that it is reasonable in time and space, necessary to protect legitimate interests, and not an obstruction of the public interest.”).

146. *Sentry Insurance v. Firnstein*, 442 N.E.2d 46, 47 (Mass. App. Ct. 1982) (holding that non-compete agreements are construed against employers because they are often the result of unequal bargaining power and employees rarely understand their implications).

147. *Alexander*, 488 N.E.2d at 28 (“Postemployment restraints . . . must be scrutinized carefully to see that they go no further than necessary to protect an employer’s legitimate interests, such as trade secrets or confidential customer information.”).

148. *Kroeger v. Stop & Shop Cos., Inc.*, 432 N.E.2d 566, 568 (Mass. App. Ct. 1982) (“Among the questions which courts typically ask are: . . . Is the restraint injurious to the public?”).

149. *See, e.g., RICHARD FLORIDA & MARTIN KENNEY, THE BREAKTHROUGH ILLUSION: CORPORATE AMERICA’S FAILURE TO MOVE FROM INNOVATION TO MASS PRODUCTION* 87, 91 (1990).

150. *Id.* at 91–92.

151. Christine M. O’Malley, *Covenants Not to Compete in the Massachusetts Hi-Tech Industry: Assessing the Need for a Legislative Solution*, 79 B.U. L. REV. 1215, 1225 (1999).

152. *Id.* at 1225–26.

1950s, it was deemed the “Golden Semicircle.”<sup>153</sup> The highway earned this name after attracting some of the first modern, suburban industrial parks to its perimeter.<sup>154</sup> Fueled by Cold War defense spending and the talented minds of Harvard University and the Massachusetts Institute of Technology (MIT), these industrial districts began attracting high-tech employers in the 1950s, including Raytheon.<sup>155</sup> Over the course of the next three decades, established companies as well as startups benefiting from venture capital were producing great innovations, especially in the manufacturing of transistors, semiconductors, and minicomputers.<sup>156</sup> By the 1970s, Route 128 had earned the distinction of being the nation’s leading center of electronics innovation.<sup>157</sup>

Massachusetts pre-chapter 228 non-compete law fostered an employment pattern in Route 128 that was very different from Silicon Valley’s collaborative and integrated approach.<sup>158</sup> Given the relative strength of non-compete agreements, employees in Route 128 were motivated to stay with their employer as opposed to joining another or starting their own venture.<sup>159</sup> This reality encouraged “long-term career patterns, vertical integration, and, ultimately, internal rather than districtwide innovation,”<sup>160</sup> as well as a “certain conservative spirit.”<sup>161</sup> It also resulted in secrecy “between companies and their customers, suppliers, and competitors, reinforcing a regional culture that encourages stability and self-reliance.”<sup>162</sup> Many of the initial occupiers of Route 128 were research labs funded by defense initiatives and propelled by the knowledge of Harvard and MIT graduates.<sup>163</sup> Interestingly, as nonprofits, these employers were unlikely to have noncompete agreements, resulting in

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153. EARLS, *supra* note 143, at 9–10, 29.

154. *Id.* at 7.

155. *Id.* at 7–8. “Raytheon Company is a technology and innovation leader specializing in defense, civil government and cybersecurity solutions.” *Who We Are*, RAYTHEON, <https://www.raytheon.com/ourcompany> [<https://perma.cc/5H4W-E8YK>] (last visited Oct. 9, 2019). The company “provides state-of-the-art electronics, mission systems integration and other capabilities in the areas of sensing; effects; and command, control, communications and intelligence systems.” *What We Do*, RAYTHEON, <https://www.raytheon.com/au/capabilities> [<https://perma.cc/L897-S2XZ>] (last visited Oct. 9, 2019).

156. EARLS, *supra* note 143, at 8.

157. SAXENIAN, *supra* note 127, at 17.

158. Gilson, *supra* note 129, at 606.

159. *Id.*

160. *Id.*

161. LOBEL, *supra* note 105, at 68.

162. AnnaLee Saxenian, *Silicon Valley Versus Route 128: A Look at How Companies are Shaped by the Business and Social Cultures Around Them*, INC. (Feb. 1, 1994), <https://www.inc.com/magazine/19940201/2758.html> [<https://perma.cc/J56C-4WP2>].

163. Gilson, *supra* note 129, at 606.

many of their employees leaving to start businesses in Route 128.<sup>164</sup> So, despite the region's early development by uninhibited employees, the employees of these initial employees, the so-called second stage, were constrained by non-competes.<sup>165</sup>

The 1980s marked a peak in Route 128 high-tech production, as the 1990s saw new tech hubs across the United States emerge and certain product markets become all but eradicated by superior inventions.<sup>166</sup> The economic and industry downturns resulted in an exodus of some of the region's tech talent, especially to Silicon Valley.<sup>167</sup> Some scholars attribute the decline and loss of talent of Route 128 to the state's non-compete law.<sup>168</sup> They argue that the relative ease with which employers in Route 128 were able to retain their employees limited the sharing of knowledge in the region.<sup>169</sup> When new technologies emerged, employers that made heavy investments in dedicated equipment and specialized labor were quickly overwhelmed and unable to adapt.<sup>170</sup> Furthermore, the isolation of individual employers prevented the collective technological learning necessary in the always-innovating industry.<sup>171</sup> Those who argue Massachusetts's pre-chapter 228 non-compete law hurt the state's tech-hub specifically cite the region's failure to recognize the decline of minicomputers<sup>172</sup> and adapt by transitioning to smaller workstations and personal computers, a move companies in Silicon Valley executed effectively.<sup>173</sup>

However, some argue these examples are inappropriate and reject comparisons between California and Massachusetts as indicative of Massachusetts's non-compete law being inferior.<sup>174</sup> Christopher Geehern of

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164. *Id.* at 606–07.

165. *Id.* at 607.

166. EARLS, *supra* note 143, at 8. The area's defense contractors were also deeply affected by the conclusion of the Vietnam War and the slowing of the space race. SAXENIAN, *supra* note 127, at 17. Raytheon alone laid off forty percent of its workforce. *Id.*

167. *Id.* at x.

168. See O'Malley, *supra* note 151, at 1229.

169. SAXENIAN, *supra* note 127, at 9.

170. *Id.*

171. *Id.*

172. The minicomputer was introduced in the 1960s as a smaller, cheaper, and more user-friendly alternative to the room-filling mainframes of the previous decade. Gordon Bell, *Rise and Fall of Minicomputers*, ENG'G TECH. HISTORY WIKI, [https://ethw.org/Rise\\_and\\_Fall\\_of\\_Minicomputers](https://ethw.org/Rise_and_Fall_of_Minicomputers) [https://perma.cc/KYY6-NQMJ] (last visited Oct. 7, 2019). The system was equipped with a limited number of programs to assist businesses with process control and data transmission. *Id.*

173. SAXENIAN, *supra* note 127, at 9.

174. See Greenhouse, *supra* note 108.

Associated Industries of Massachusetts<sup>175</sup> asked “[i]f [non-competes] are so onerous and burdensome, why aren’t we seeing a significant migration of talent away from the companies that use [non-competes] toward the companies that don’t use them?”<sup>176</sup> He continued by pointing out that “[t]he companies that use [non-competes] still attract plenty of the best and brightest.”<sup>177</sup> Furthermore, “Michael Rodrigues, a Democratic state senator from Fall River, [MA], said the government should not be interfering in contractual matters like [non-competes]. ‘It should be up to the individual employer and the individual potential employee among themselves,’ he said. ‘They’re both adults.’”<sup>178</sup>

Clearly, California and Massachusetts have very different non-compete laws, and there are numerous views surrounding those law’s effects on each state’s respective tech industries. Perhaps the story of William Shockley may put these views in perspective. Shockley, a Nobel-prize winning physicist, left a position on the East Coast for California in the 1950s and became the first to produce silicon semiconductors—where Silicon Valley would eventually get its name—in the region.<sup>179</sup> While brilliant, Shockley lacked social and management skills and, within a year of starting his California business, drove away eight of his researchers.<sup>180</sup> These researchers became known as the “traitorous eight,” and two of them would go on to found one of the world’s largest and most valuable high-tech manufacturers, Intel.<sup>181</sup> It was from branch offs like this that Silicon Valley rose to prominence.<sup>182</sup> Had Shockley established his business in Massachusetts, it is very likely the traitorous eight would have signed a non-compete agreement and either been dissuaded from being so “traitorous” or unable to start their own ventures nearly as quickly.<sup>183</sup> While many policy considerations go into non-compete law,<sup>184</sup> the story of Shockley is telling of these laws in practice.

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175. *Management Team*, ASSOCIATED INDUS. OF MASS., <https://www.aimnet.org/about-associated-industries-massachusetts/management-team.cfm> [<https://perma.cc/F8SU-AT7Q>] (last visited Oct. 6, 2019).

176. Greenhouse, *supra* note 108.

177. *Id.*

178. *Id.*

179. William B. Shockley, NOBEL PRIZE, <https://www.nobelprize.org/prizes/physics/1956/shockley/biographical/> [<https://perma.cc/6HFY-ULL7>] (last visited Oct. 6, 2019).

180. Alex Tabarrok, *Non Compete Clauses Reduce Innovation*, MARGINAL REVOLUTION (June 9, 2014, 10:23 AM), <https://marginalrevolution.com/marginalrevolution/2014/06/non-compete-clauses.html> [<https://perma.cc/YFR2-2TDJ>].

181. *Id.*

182. *Id.*

183. *Id.*

184. *See supra* Section III.B.



#### IV. REFORMING WISCONSIN NON-COMPETE LAW TO ATTRACT HIGH-TECH EMPLOYERS

##### A. *Why Wisconsin Law Should Change*

As discussed, section 103.465 provides statutory guidance for non-competes in Wisconsin, which has been subsequently illuminated by common law.<sup>185</sup> Agreements that (1) are necessary to protect the employer, provide reasonable (2) time and (3) territorial limits, (4) are not harsh or oppressive to the employee, and (5) are not contrary to public policy, will generally be enforced in Wisconsin.<sup>186</sup> These agreements are prima facie suspect, closely scrutinized, and construed in favor of the employee.<sup>187</sup> These legal realities have two implications: (1) Wisconsin non-compete law is more like Massachusetts than it is like California,<sup>188</sup> and (2) employers must consider many factors to draft an enforceable non-compete agreement.<sup>189</sup>

While arguments to the contrary may exist from some in Massachusetts,<sup>190</sup> an analysis of California and Massachusetts non-compete law demonstrates that eliminating the use of non-competes creates high-velocity employment that benefits high-tech employers because of the industry's constant need to innovate and adapt.<sup>191</sup> With laws that complement the employee-restrictive doctrines of Massachusetts and conflict with the free-market theories of California, Wisconsin non-compete law does not currently offer a suitable environment for immense growth of high-tech manufacturing.

The large and detailed body of Wisconsin non-compete common law has prompted the creation of many advisory articles for attorneys in the state.<sup>192</sup> As a whole, the process requires precision and specificity,<sup>193</sup> but even then, if any

185. *See supra* Section II.B.

186. *Lakeside Oil Co. v. Slutsky*, 8 Wis. 2d 157, 161–62, 98 N.W.2d 415, 418–19 (1959).

187. *Farm Credit Servs. of N. Cent. Wis., ACA v. Wysocki*, 2001 WI 51, ¶ 9, 243 Wis. 2d 305, 627 N.W.2d 444.

188. Both Massachusetts and Wisconsin require that non-competes protect legitimate business interests and have reasonable time and territorial restrictions. *See supra* text accompanying notes 40 and 144. The states also consider public policy, scrutinize the agreements carefully, and favor employees. *See supra* text accompanying notes 40, 50, 145–46. Unlike California, Wisconsin does not presumptively void non-compete agreements. *See supra* text accompanying notes 38 and 116.

189. Sara J. Ackerman, *Restrictive Covenants in Employment: Drafting Enforceable Agreements*, STATE BAR OF WIS.: ROTUNDA REPORT (Jan. 16, 2013), <https://www.wisbar.org/NewsPublications/RotundaReport/Pages/Article.aspx?ArticleID=10494> [<https://perma.cc/NQ7B-BTUB>].

190. *See supra* text accompanying notes 173–77.

191. *See supra* Section III.B.

192. *See, e.g.,* Anzivino, *supra* note 67, at 499; Nettesheim & Broomfield, *supra* note 73, at 20; Ackerman, *supra* note 189.

193. *See* Ackerman, *supra* note 189.

provision or clause of the non-compete is deemed unreasonable, the entire agreement is void.<sup>194</sup> With regard to non-solicitation and confidentiality clauses, serious confusion exists in practice, making the threat of a void agreement even more significant.<sup>195</sup> For example, it is unclear if non-solicitation clauses can set territorial limits implicitly by setting customer limits.<sup>196</sup> Confidentiality agreements are difficult to navigate because the protection of proprietary information is subject to time and territorial limits, even though the information can do damage to an employer indefinitely and from anywhere.<sup>197</sup> Given these difficulties associated with drafting non-compete agreements, high-tech employers considering Wisconsin may lack the confidence that their interests will be protected.<sup>198</sup>

Wisconsin non-compete law should change not only because of the flaws in its current design, but also because of the state's ripeness for tech growth. CBRE, the largest commercial real estate services and investment firm of its kind,<sup>199</sup> ranked Madison, Wisconsin first on its list of tech talent momentum markets in the company's 2017 Scoring Tech Talent Report.<sup>200</sup> The report credited Madison's labor pool growth,<sup>201</sup> high number of millennial residents,<sup>202</sup> and well-educated populace<sup>203</sup> for its tech success. With a comparable university system and cost structure to Madison, Milwaukee's tech-market has also shown promising signs.<sup>204</sup> According to a report titled "Milwaukee's Tech Talent Impact," Wisconsin's largest city boasts "a sizeable base of technology talent that consists of nearly 76,000 workers and supports

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194. WIS. STAT. § 103.465 (2015–2016).

195. *See supra* text accompanying notes 51–67.

196. *See supra* text accompanying note 58.

197. *See supra* text accompanying notes 60–67.

198. *See supra* Section III.A.

199. *CBRE #1 Real Estate Company on Fortune's Most Admired List*, CBRE (Jan. 22, 2019), <https://www.cbre.com/about/media-center/fortune-most-admired-list-2019> [https://perma.cc/6BR9-WKWQ].

200. *Madison Named Top City for Tech Talent Growth, Ranking #1 on CBRE's Annual List of Tech Momentum Markets*, CBRE (July 19, 2017), <https://www.cbre.us/about/media-center/madison-named-top-city-for-tech-talent-growth-ranking-1-cbre-annual-list-tech-momentum-markets> [https://perma.cc/99NQ-24M7]. The report measured the change in tech job growth. *Id.*

201. "Over the past five years, the tech labor pool grew more than 50 percent in the Madison area, with jobs in software development, computer systems support and technology engineering." *Id.*

202. "The population of millennials in their 20s grew by 4,490 (7.3 percent) since 2010, accounting for 29.6 percent of total growth in a population of 248,956." *Id.*

203. "Madison ranks among the top 10 markets in the report for educational attainment - 44.7 percent of people 25 years old or older have a bachelor's degree or higher." *Id.*

204. Stephanie Morse, *New Reports Cite Growth of Madison and Milwaukee as Tech Employment Clusters*, MILWAUKEE J. SENTINEL (July 27, 2018), <https://www.jsonline.com/story/money/business/2018/07/27/madison-and-milwaukee-make-progress-tech-employment-clusters/836093002/> [https://perma.cc/TD4H-MPBH].

more than 140 industries,” contributing more than twenty-seven billion dollars to the regional economy.<sup>205</sup> Top executives in Milwaukee predict 30,000 job openings in the tech industry in the next five years.<sup>206</sup> The current growth of technology industries in Wisconsin combined with the state’s efforts to develop a ready workforce,<sup>207</sup> allow non-compete reform to further position Wisconsin and its new Wisconn Valley on a national and international stage as a leader in technology and innovation.

### B. *How Wisconsin Law Should Change*

Reconciling long-standing conflicts between employer, employee, and public interests, in addition to making the state hospitable for high-tech employers, is no easy task. However, with a new, more specific statute and restrained interpretation, all these interests may be to some degree advanced.

Based upon an analysis of high-tech employers and Wisconsin’s, California’s, and Massachusetts’ non-compete laws, Wisconsin should adopt a statute with the following language:

Agreements not to compete are lawful only between employers and their employees who are privy to useful proprietary information. Restrictions regarding scope, time, and territory must be specified and reasonable in consonant with public policy. Restrictions regarding information disclosure must be specific as to the nature of the obligation and information subject to it and must be reasonably necessary to protect the employer. Any agreement, described in this section, imposing an unreasonable restraint is illegal, void, and unenforceable even as to any part of the agreement or performance that would be a reasonable restraint.<sup>208</sup>

*Useful proprietary information* should be defined in the statute as information whose value derives from its secrecy and could cause an employer financial harm if disclosed. Courts should give deference to employers when

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205. MILWAUKEE REGIONAL TECH HUB, MILWAUKEE’S TECH TALENT IMPACT: AN OVERVIEW OF TECH OCCUPATIONS AND TECH-DEPENDENT INDUSTRIES 1 (2018), [https://www.multivu.com/players/English/8239954-northwestern-mutual-technology-jobs-milwaukee-economic-impact-study/docs/Fullreport\\_1530031313447-1486035915.pdf](https://www.multivu.com/players/English/8239954-northwestern-mutual-technology-jobs-milwaukee-economic-impact-study/docs/Fullreport_1530031313447-1486035915.pdf) [https://perma.cc/WXM3-L6VL]. The report is a “comprehensive study of technology talent and its impact on the economy” and the result of a partnership of approximately twenty leading job creators in the greater Milwaukee area. *First-of-its-Kind Study Demonstrates Increasing Economic Impact of Technology Jobs in the Milwaukee Region*, MULTIVU (June 26, 2018), <https://www.multivu.com/players/English/8239954-northwestern-mutual-technology-jobs-milwaukee-economic-impact-study/> [https://perma.cc/47QJ-B9ZX].

206. Morse, *supra* note 204.

207. See *supra* text accompanying notes 16–19.

208. See *infra* Appendix A.

considering whether information fits this definition. The first sentence of this statute and its corresponding deference and interpretation instructions serve two purposes: (1) limit the number of employees subject to non-compete agreements and (2) secure employer secrets. The first of these purposes promotes employee and public interests, as it allows for more free movement in the market than the current Wisconsin statute. The second serves employers, but in a way that protects them from *unfair* competition rather than the mere existence of competition. The suppression of employee movement by Steve Jobs and other executives in Silicon Valley shows that even with a complete ban, employers still find a way to promote their interests.<sup>209</sup> Thus, a statute such as this that allows employers to secure their interests while simultaneously promoting employee movement is preferable.

The second sentence of the proposed statute<sup>210</sup> is a nod to the current reasonableness standard.<sup>211</sup> It is subject to public policy, so courts can adapt reasonableness standards as labor markets and public sentiments change in ways we have yet to imagine. As discussed, throughout the history of non-compete agreements, courts have balanced employer, employee, and public interests according to the time period's norms,<sup>212</sup> therefore, this statutory provision deviates little from this area of law's statutory interpretation process. Unlike the sentence that precedes it, deference with regard to issues arising from the application of this sentence should be given to the employee. This deference instruction is another effort to encourage the free movement of employees.

The third sentence<sup>213</sup> attempts to resolve the current confusion with non-solicitation and confidentiality clauses<sup>214</sup> by separating the reasonable scope, time, and geography standards from the protection of information. This separation gives employers as much protection as possible, while also preventing them from keeping employees out of the market and imposing overly broad restrictions. Furthermore, it incorporates another *Lakeside* element<sup>215</sup> by necessitating that the protection of the information be necessary to the employer.

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209. See *supra* text accompanying notes 135–39.

210. See *infra* Appendix A (“Restrictions regarding scope, time, and territory must be specified and reasonable in consonant with public policy.”).

211. See *supra* text accompanying notes 37–45.

212. See *supra* text accompanying notes 27–30.

213. See *infra* Appendix A (“Restrictions regarding information disclosure must be specific as to the nature of the obligation and information subject to it and must be reasonably necessary to protect the employer.”).

214. See *supra* text accompanying notes 51–67.

215. See *supra* text accompanying note 40.

The final sentence of the proposed statute is essentially identical to the final sentence of section 103.465.<sup>216</sup> The sentence forces the court to find the entire agreement unenforceable even if only one part is unreasonable. Allowing the court to enforce certain portions of the agreement while striking others results in a “blue pencil” rule.<sup>217</sup> Wisconsin followed the blue pencil rule in *Fullerton Lumber Co. v. Torborg*,<sup>218</sup> but after the case, the legislature wanted a restraint containing overly broad and invalid provisions to be struck down in its entirety and adopted section 103.465 of the Wisconsin Statutes.<sup>219</sup> Critics of the blue pencil rule argue that allowing courts to modify agreements intrudes on matters that should be negotiated between parties, turning judges into attorneys after the fact and leaving parties with an agreement neither consented to.<sup>220</sup> Given the strength of blue pencil criticisms and Wisconsin’s very clear desire to rid the state of the doctrine, this proposed statute does not alter the state’s response to unenforceable non-compete provisions, even though invalidating only what is unreasonable would make employers feel more secure.

A tech hub is not just a collection of *employers*; it is also a collection of *employees*, supported by the *public*. A state can get as many tech employers to set up shop as it wants, but it will be completely devoid of the benefits if employees have no interest in the state’s legal climate. This statute recognizes the interdependence of employers, employees, and the public and succeeds in advancing each one’s general interests.

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216. Compare *infra* Appendix A (“Any agreement, described in this section, imposing an unreasonable restraint is illegal, void, and unenforceable even as to any part of the agreement or performance that would be a reasonable restraint.”), with WIS. STAT. § 103.465 (2015–2016) (“Any covenant, described in this section, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.”).

217. William T. Rosenbaum, Note, *Ohio Puts Away Its Blue Pencil*, 5 CAP. U. L. REV. 99, 100 (1976).

218. 270 Wis. 133, 144, 147–48, 70 N.W.2d 585, 586, 592 (1955) (concluding that a ten-year restrictive covenant was unreasonable, but by editing the contract, it deemed the covenant enforceable for three years).

219. *Streiff v. Am. Family Mut. Ins. Co.*, 118 Wis. 2d 602, 608, 348 N.W.2d 505, 509 (1984) (“In 1957 after the . . . *Fullerton Lumber* case, the legislature adopted [section] 103.465 at the suggestion of a legislator who was critical of the *Fullerton Lumber* decision.”). The court confirmed its abandonment of the blue pencil doctrine in *Star Direct, Inc. v. Dal Pra*. 2009 WI 76, ¶ 76, 319 Wis. 2d 274, 767 N.W.2d 898 (“Though the question was withheld in *Streiff*, we now make clear that we believe the legislative history and text of the statute do not eliminate or modify the common law rules on divisibility. The statute’s prescriptions support this as they apply to any ‘covenant,’ not to the whole employment contract. It specifies that if a restraint is unreasonable, the rest of that covenant is also unenforceable.”).

220. See, e.g., Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 674 (2007).

## V. CONCLUSION

As the push for high-tech manufacturing jobs continues, states with attractive legal climates will accrue great benefits. Wisconsin has already attracted one tech giant in Foxconn but can do more to foster an environment suitable for the high-tech industry by reforming its non-compete law. The high-tech world is one of constant innovation, necessitating the relatively free flow of innovators. Fortunately, it is possible through new and specific statutory language, as well as judicial restraint in the application of this language, for high-tech employees to move relatively freely while still protecting employers from the loss of their valuable confidential information. By reconciling the interests of employers, employees, and the public with non-compete law reform, Wisconsin may just turn the Wisconsin Valley into the next Silicon Valley.

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## APPENDIX A: PROPOSED WISCONSIN STATUTE

Agreements not to compete are lawful only between employers and their employees who are privy to useful proprietary information. Restrictions regarding scope, time, and territory must be specified and reasonable in consonant with public policy. Restrictions regarding information disclosure must be specific as to the nature of the obligation and information subject to it and must be reasonably necessary to protect the employer. Any agreement, described in this section, imposing an unreasonable restraint is illegal, void, and unenforceable even as to any part of the agreement or performance that would be a reasonable restraint.